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In The

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE,

AND

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

This brief *amicus curiae* is filed in support of the position of the petitioner by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 106 national and international labor unions, having a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

SUMMARY OF ARGUMENT

I. The issue in this case is whether the National Labor Relations Board may constitutionally order a church

affiliated secondary school to bargain with a union selected by the majority of its teaching employees. Before one can judge the conformity of a particular form of facially neutral government regulation with the First Amendment guarantee of freedom of religion, it is necessary to have firmly in mind the parameters of that regulation, so that the potential effect upon religious activities may be judged.

The court below entirely misgauged the precise nature of NLRB jurisdiction. It therefore premised its holding that the Religion Clauses would be offended by such jurisdiction upon several erroneous assumptions. In particular, as we show in Part I, the Court of Appeals failed to recognize that the national labor policy as embodied in the NLRA compels negotiation but not agreement. Moreover, that court assumed that, in deciding various unfair labor practice charges, the Board and the courts would necessarily determine disputes concerning religious doctrines, and issue orders compelling the religious school to act in a manner contrary to its prosyletizing mission. Yet, analysis of the actual role of the Board in unfair labor practice cases, as delineated by this Court, demonstrates that the Agency acts only where anti-union motivation has been proved or may from the egregious nature of the conduct, be presumed. And, contrary to the generalization indulged in by the Court of Appeals, it is possible to conduct such inquiries without ever determining either the validity of a particular proposition as an element of church dogma, or the abstract truth or worth of any religious belief. Motive questions can almost invariably be decided with reference to purely empirical secular facts. While it may occasionally be helpful for an employer relying upon religious motivation to illustrate some basis in church writings for that claim, such

materials would merely be part of proof that the employer actually did hold a certain belief and acted upon it; the fact that others of the same religion, or of other religions might disagree would be irrelevant.

II. Once the limited nature of the NLRA jurisdiction is understood, it becomes plain that this Court's decision in *Associated Press* v. *Labor Board*, 301 U.S. 103, is determinative of this case. In *Associated Press*, a publisher claimed exemption from the NLRA for his editorial employees on the basis of interference with freedom of the press. The Court, while assuming that government action denying a publisher-employer control over the writing activities of editorial employees would raise serious constitutional questions, could perceive no such proclivity in the NLRA. Since freedom of the press and freedom of religion are precisely equal First Amendment rights and since the complaints of the employers in *Associated Press* and in this case are basically parallel, *Associated Press* must govern unless there is some particular relevant difference between the Religion Clause and free press protections. We show in the concluding portion of Part II that neither the principle prohibiting secular determination of religious disputes, nor the need to avoid excessive entanglement between church and state, relied on below to distinguish *Associated Press* is here implicated. Therefore, we submit that the *Associated Press* precedent is controlling and that the opinion below must be reversed.

ARGUMENT

I.

The opinion of the Court of Appeals in this case proceeds upon several misconceptions regarding the character

of governmental regulation under the National Labor Relations Act. While these misunderstandings are fairly elementary, it is well to discuss them at the outset so that the issues herein may be sharpened. For, the opinion below reads at points as if an order to bargain, which is all this case concerns, is either a command that the union rather than the employer will henceforth set and administer the fundamental policies of employers subject to the Act (see, e.g., Pet. App. 28a-29a), or, at least, an edict which either establishes or permits the National Labor Relations Board to establish a comprehensive set of substantive rules prescribing the standards for hiring, firing, distribution of work responsibilities, and so on (see, e.g., Pet. App. 29a-30a, 33a-36a). But, the Act, the basic statute which governs private employment relations in this country is, of course, of quite a different character than the opinion below would suggest.[1]

[1] We agree with the Court of Appeals that the "completely religious—merely religiously associated" jurisdictional standard adopted by the Board is constitutionally unsound because that standard necessarily requires the Board to make religious judgments forbidden by the First Amendment. We might add that the Board's characterization of the secondary schools operated by the Catholic Diocese as only "religiously associated" is contrary to this Court's decisions. It would, therefore, be possible for this Court to vacate the decision below in this case and order a remand to the Board with direction for it to reconsider whether it wishes to exercise jurisdiction in this case on the basis of a standard which is not constitutionally infirm. On the other hand, the Court of Appeals accepted the Board's position that if this test were struck down, "the Board would necessarily have to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates." (Pet. App. 27a.) On that basis, the Board's error in setting the standard would not affect the disposition of the case. In either event, it does not justify the Court of Appeals' conclusion that the NLRA may not constitutionally be applied to respondent.

1. In establishments covered by the NLRA, the employer is not required to entrust to a union, or even, ordinarily, to negotiate or discuss with the union how management decisions are to be made. (See *Fibreboard Paper Products Corp.* v. *Labor Board*, 379 U.S. 203, 225 (Stewart J., concurring).) And, while the employer is required to bargain in good faith regarding subjects relating to the employment relationship—those pertaining to "wages, hours, and other terms and conditions of employment" (§ 8(d))—he is not required, as to those subjects concerning which he must bargain, either to concur in the union's demands or, even, to reach any agreement whatever.

The latter point was stated by this Court in originally sustaining the constitutionality of the Act:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (*Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45.)

Since 1947, the same principle has been incorporated in the language of § 8(d) of the Act itself. It is therefore "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*Labor Board* v. *American National Ins. Co.*, 343 U.S. 395.) Rather, "the fundamental premise on which the Act is

based [is] private bargaining under governmental supervision *of the procedure alone*, without any official compulsion over the actual terms of the contract." (*H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99, 108 (emphasis supplied).)

Thus even as to those subjects concerning which an employer is obligated to bargain in good faith, he is entitled to reject for economic reasons, or other reasons—including reasons related to his own religious views[2]—demands of the union as unacceptable.

2. As we shall later explain, *infra* at pp. 19-24, the particular speculations indulged in by the Court of Appeals regarding First Amendment issues which *could* arise if unfair labor practices other than the simple refusal to bargain here at issue were later alleged are not properly determinative of this lawsuit. Because the opinion below, however, conveys the impression that if jurisdiction over church-affiliated schools is recognized, the Board's role in adjudicating disputes under §§ 8(a)(1) & (3) of the Act will inevitably lead to wholesale administrative determination

[2] For example, an employer who operates a secular retail business but is an orthodox Jew or a Seventh Day Adventist would feel obliged by his faith to close his establishment on Saturdays, perhaps remaining open instead on Sunday. If his employees preferred working Saturdays to working Sundays, the Act compels discussion of whether there is any way to avoid Sunday work, but would not penalize the employer for insisting that Saturday opening was simply not an acceptable alternative, or call upon the employer to justify his religious precepts in a § 8(a)(5) unfair labor practice proceeding.

Thus the issues posed by this case may arise in the ordinary industrial context with secular employers who, of course, have as much a constitutional right to operate their enterprises consistently with their religious views as does an organization dedicated to full-time religious activity.

of essentially religious disputes, some review of established general principles in this area is necessary.

Before doing so, however, we note that it is fundamental to this case that, as the Board stated in its Petition (at 14), the churches with which the respondent schools are affiliated are not religiously opposed to unions as such, or to bargaining with unions. That is, there is no contention, as we understand it, that the schools are compelled by their religious mission to discharge teachers who join unions for that reason alone, or otherwise to discourage unions as such. Nor is there any claim that the particular unions here involved, or any unions for that matter, require their members to subscribe to views or to perform acts which would render their members necessarily unfit to teach in these religious schools, for reasons relating to the religion sought to be inculcated. Thus, there does not appear to be anything in the general provisions of § 8(a) of the Act which is contrary to the religion which it is an important mission of respondent schools to propagate.

The claim, rather, seems to be that in determining whether an employer has committed an unfair labor practice—in particular, whether it has "interfer[ed] with, restrain[ed] or coerc[ed] employees in the exercise of their rights * * * to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and * * * to refrain from any or all such activities * * *" (§§ 7 & 8(a)(1)), or has "by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . encourage[d] or discourage[d] membership in any labor organization * * *"

(§ 8(a)(3))—the Board will require the religious school-employer to submit its religious values to the Board for evaluation, and may require the employer to take action which would be contrary to fulfillment of the school's religious mission—e.g., reinstating a "heretic."

To evaluate these fears that Board jurisdiction will lead to a form of religious inquisition and control, the appropriate starting place, once again, is this Court's seminal opinion on the role of the Board under the Act. In *Jones & Laughlin, supra,* the Court was faced with a contention similar to that here, albeit in the industrial context—that the Act would give the government the right to wholesale interference in private enterprise through regulation of employee discipline. The Court rejected this contention by noting the limited province of the Board under the Act:

> "The Act * * * does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employers may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization, representation and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for reasons other than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." (301 U.S. at 48)

In later cases, the Court has expanded on the manner in which interference with union activity, or discrimination discouraging union adherence, may be proven. First, with respect to § 8(a)(3), that section:

> "prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See *Labor Board v. Brown* [380 U.S.] 278; *Radio Officers' Union* v. *Labor Board*, 347 U.S. 17, 43; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46. Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees' suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, *e.g., Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347. Such a construction of § 8 (a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See *Textile Workers* v. *Darlington Mfg. Co.*, [380 U.S.] 263.

> "This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose. *Radio Officers' Union* v. *Labor Board, supra,* 347 U.S. at 44-45; *Labor Board* v.

> *Erie Resistor Corp., supra.* Thus where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced." (*American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 311-312.) [3]

Basically, the same rule obtains with respect to § 8(a)(1)—that proof ordinarily requires a showing of intent, but that some "acts * * * are demonstrably so destructive of [protected rights] that the Board need not inquire into employer motivation." (*Id.*, at 309.) [4]

3. While the court below apparently recognized that a showing of union-related motive is ordinarily a predicate to finding an unfair labor practice under the sections it was concerned about, it believed that the very act of establishing such a motive could lead to inquisition into religious belief. But the Court of Appeals, apparently encouraged by respondents in this regard, consistently confuses several types of inquiry into religious motivation—inquiry into

[3] The kind of situations which this Court has indicated involve "inherently . . prejudicial" behavior include, in addition to that mentioned in the quotation in the text, disparate wage treatment of employees based solely on union membership (*Radio Officers' Union* v. *Labor Board*, 347 U.S. 17, 46), a lockout in the form of permanent discharge of unionized staff and replacement with employees known to be possessed of a strong antiunion animus (*American Ship*, *supra*, 380 U.S. at 309), and superseniority for strike replacements and strikers who return to work (*Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221). As these examples illustrate, the sort of behavior involved is such that the same presumed intent would ordinarily be justified in the church-affiliated school context without any impact upon the religious mission of such schools.

It is possible, however, that, since those rules were developed in the business context, with absence of "significant *economic* justification" (*American Ship*, *supra*, 380 U.S. at 312, emphasis supplied) the most significant factor, the same conclusions as to inherently prejudicial behavior would not be reached in the church-affiliated school context.

For example, one hypothetical mentioned by the Court of Appeals is the circumstance in which a religious school replaced lay teachers who were union members because religious order teachers were available. (Pet. App. 29a). On its face, this appears to be close to the example cited in *American Ship*, *supra*, since one can expect that religious-order teachers would not form a union. And, if it developed that *only* union members, or known strong union adherents were replaced, and nonunion adherents remained, we would think that the result suggested in *American Ship* would follow. If, however, all lay teachers were discharged, and the school could establish that for religious reasons it indeed had preference for religious-order teachers when available we would think the Board would take into account the context and decline to apply *per se* rules developed in the business context, just as it would decline to apply such rules in other non-business contexts—e.g., purely secular schools—if reasons appeared for perceiving a justification not present in the industrial world.

[4] One slight variant of the "inherently prejudicial" category in the § 8(a)(1) context is the rule of *Labor Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21—that § 8(a)(1) is violated if it is shown that "the discharged employee was at the time engaged in a protected activity; that the employer knew it was such; that the basis of the discharge was an alleged act of misconduct in the course of that activity; and that the employee was not, in fact, guilty of that misconduct" (*id.*, at 23), even if the employer in good faith *believed* that the employee had engaged in misconduct. The Court of Appeals (Pet. App. 29a) evidently did not understand that this rule applies only where the misconduct allegedly occurred during activity protected by § 7, rather than during the ordinary course of work (*Burnup & Sims*, *supra*, 379 U.S. at 24). At any rate, we fail to see how a religion-related prerogative could be implicated by application of this rule: to use facts close to those involved in *Burnup & Sims*, itself, if the church-affiliated school officials believed that Ms. X had, while soliciting for the union, also solicited for signatures on a pro-abortion petition, but in fact she did not, then reinstating Ms. X cannot harm the school's religious purpose.

whether in fact the reason given motivated the action taken; inquiry into whether the religious reason given actually reflects the precepts of the church involved; and inquiry into, or evaluation of, the validity as a matter of abstract truth of the religious precept.

For example, the lower court begins its speculation regarding the situation in which a teacher involved in pro-union activity and also in activity contrary to church doctrine is discharged with the statement that any unfair labor practice proceeding "would certainly in part involve the Church's religious policies and beliefs." (Pet. App. 30a). This statement, read narrowly, is undoubtedly true: the church-affiliated school, like any other employer, would be entitled to offer proof that, in fact, the reason for the discharge was not union activity but a reason entirely unrelated thereto—breaking a work rule or in this instance, failing to abide by religious rules, observance of which is required of all teachers. Whether or not the reason claimed by the employee or that claimed by the employer actually motivated the discharge would then be the issue, and to that degree the Church's religious precepts would be "involved." But, as the broad outline of how unfair labor practice cases are tried presented above suggests, this kind of question can usually be adjudicated—and in industrial conflicts usually is adjudicated—by methods which do not in any real sense implicate the second line of inquiry described above, and which never should involve the third at all.

For example, the first and simplest questions in such a situation would be such inquiries as whether the employee discharged actually espoused the antireligious view or committed the antireligious act claimed, whether, if so, the employer stated those views or acts as the reason for the discharge when it occurred; and whether the employee was in fact known by the employer to be a union activist. Once these facts were established, the employee might show that the "heretical" views or lifestyle claimed as the reason for the discharge was known to the employer long before, but acted upon only when union activity began; or, he or she might attempt to demonstrate that among those employees who espoused "heretical" views, only union leaders were discharged. If either of these facts was shown, a finding of impermissible motive would probably follow without more (*American Ship, supra*, 380 U.S. at 312).[5] Conversely, the employer could prove that always, without exception, when the "heretical" views of lifestyle of a teacher was known, that teacher was fired forthwith, regardless of any other aspect of their performance; or, the employer could demonstrate that the employee in question was the only one of

[5] If the church school tolerated other teachers of the same views or lifestyle as the teacher discharged, or tolerated the same views or lifestyle previously by the same teacher, then it apparently does not regard those ideas or actions as fundamentally inconsistent with it religious mission, and requiring reinstatement of the union adherent would not constitute the compromise of church policy the Court of Appeals suggests in its "heretic" hypotheticals. Similarly, if an individual who both did or said things inconsistent with church philosophy and was a union activist as well can demonstrate that the union activity was at least partially the motivation for the discharge, then the usual implication would be that he or she would not have been fired but for the union activity. Reinstatement of a person of "heretical" views who would have been retained, despite those views, had the union activity not occurred as well cannot constitute interference with the school's religious-based policies.

many known union adherents fired and also the only employee whose "heretical" views became apparent for the first time after union organizational activity began.

Thus, it would ordinarily be possible to resolve the motivation question with reference to empirical, secular facts. If the employer succeeded in showing in this manner that his claimed motivation was the true one, it would be entirely irrelevant whether the rule enforced derived from the employer's notion of good religion, good manners, or good economics, as long as anti-union animus was negated as a contributing factor.

It is possible, however, to imagine a few limited circumstances in which it might become relevant to inquire whether some claimed reason for discharge was in fact regarded by the school administration as a rule of religious thought or conduct. For example, if an employee were to espouse a view or do something which no other employee had ever said or done before with the employer's knowledge, comparison with past actions in similar circumstances would not be possible. If, moreover, it was not possible to perceive a clear pattern with regard to disciplinary action as between union adherents and nonunion advocates, the church-affiliated school might be constrained to establish some basis for the contention that the employee's statements or actions did in fact lead it to conclude that that employee was unfit to teach in a church school if such was its contention, just as it would be obligated to demonstrate a belief that the employee was incompetent if that was the justification offered.

Such a situation would be similar, that is, to that in which a secular employer invoked a claimed rule of work behavior

which it was unable to show had ever been a premise for discharge before. Such an employer might well, to convince an administrative law judge that its actions were motivated by that rule, prove the existence of such a rule, and of the importance of such a rule, by reference to written or oral instructions issued to employees in the past.

Thus, it is at least possible that in one sense, at least, an unfair labor practice proceeding of this type "would * * * include [examination of] the [existence] as a part of church doctrine of the reason given for the discharge." (Pet. App. 33a). But, as illustrated above, it is *not* true that such an issue would "necessarily" (*id.*) be involved. Nor would the "validity" (*id.*) of the rule as church doctrine be in question; the fact that the school administrators in question believed a given precept to be a part of church doctrine and acted on that belief would be sufficient, regardless of whether the employee was able to demonstrate that other adherents of the same religion took another view of the matter. Therefore, it is *not* true that "to eliminate the pretextual aspect of claimed justification * * * would * * * involve * * * showing the *validity* of the claimed doctrinal position advanced" (Pet. App. 44a, emphasis supplied), although it might be helpful to show some basis for that position to demonstrate a sincerely held belief.

The third type of inquiry—that into the abstract truth or worth of a belief sincerely held and truly acted upon—ought never to be involved in any unfair labor practice proceeding. Just as the Board's opinion regarding whether a particular, well-established work rule is really necessary to effective industrial discipline, or truly merits a serious sanction uniformly imposed, is not a consideration in such

proceedings, so the question whether the church is "right" in its views concerning abortion, or birth control, or divorce, or any other matter—or the question whether the Church ought to establish adherence to its views in these matters as a condition of employment as a teacher of mathematics, for example, if in fact it has done so—need never be addressed. Thus, whether or not the school in question or the Church with which it is affiliated "adhere[s] to beliefs which may not be generally accepted or may indeed be generally unacceptable" (Pet. App. 44a) is entirely irrelevant here, for no imposition of standards of religious belief is a conceivable outcome of enforcing the Board order in this case.

The Court of Appeals quotes, approvingly, from the brief of one of the parties in the court below to the effect that: "Whether [decisions to fire certain teachers who engaged in union activities] constitute firing for cause is for the Board to decide. Compare 29 U.S.C. § 160(c)." (Pet. App. 34a). If this reference to § 10(c) is intended to convey the impression that the Board is constrained, in administering the Act, to decide whether there was "cause" in some abstract sense, and to reinstate the employee if there was not, that impression is erroneous. For, while § 10(c) prohibits reinstatement or back pay if there *was* "cause," it does not, of course, mandate those remedies if there was not; "cause" or not, there must be a violation of a substantive section of § 8(a) before reinstatement or back pay may be ordered. And, as far as § 8(a) is concerned, an employer who can demonstrate that any employee who wears a blue shirt to work is automatically discharged, because the employer hates blue shirts, and has so informed his employees, has as effectively rebutted a pretext claim as an employer who

illustrates that employees are discharged if they fail to show up for work for three days in a row after due warning.

4. The Court of Appeals said:

> "The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to 'steer far wider of the unlawful zone' of impermissible conduct." (Pet. App. 29a-30a.)

Insofar as this reasoning applies to the bargaining requirement (which is all that is presently before this Court), it is wrong because the Court has exaggerated that duty (see pp. 5-6, *supra*). And, insofar as the potential "chilling effect" is relied on to preclude all regulation of respondent under the NLRA, it misreads *Speiser* v. *Randall*, 357 U.S. 513, and misstates the important principle which that case declared. What this Court said in the passage from which the Court of Appeals quoted is:

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States*, *supra*, provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected pos-

sibly sustain the burden of proving the negative of these complex factual elements?" (*Id.* at 526.)

Neither of the elements of the California oath struck down in *Speiser* because of its chilling effect is present under the regime of the NLRA. First, California's oath requirement placed the burden of proof on the citizen-taxpayer; the NLRA, in contrast, places that burden on the General Counsel and not on the party that is asserting a constitutional right in defense of an unfair labor practice charge.

Second, the NLRA does not "undertake[] to determine whether certain speech [for religious activity] falls within a class which constitutionally may be curtailed." (*Speiser*, *id.* at 525.) Rather, the NLRA establishes certain religiously neutral principles of conduct. To hold that such civil regulation is unconstitutional because it may cause a religious institution to "tailor [its] conduct and decisions" is to prevent the exercise of any civil authority against religious insitutions. The very example given by the Court of Appeals reveals the import of extending the "chilling effect" principle in this manner. That court hypothesizes a teacher who makes a strong pro-union speech shortly thereafter advocates ideas regarding birth control or abortion which are abhorant to the Church; the Act is said to be unconstitutional because respondent would be confronted with the choice of keeping this "heretical" employee or risking an expensive and protracted unfair labor practice proceeding. (Pet. App. 30a.) It is necessary to change only one fact in the Court of Appeals' example to demonstrate its implications. Assume that instead of a strong pro-union speech the teacher gives a militant speech alleging racial discrimination in the school's employment practices, § 704

(a) of the Civil Rights Act of 1964, to which respondent and other religious schools are subject,[6] forbids discrimination against any individual "because he is opposed to any practice made an unlawful employment practice" by Title VII. (See *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792.) If that teacher then also gives the pro-birth control or abortion speech hypothesized by the Court of Appeals, the respondent's dilemma would be the same as in the situation stated by the Court. Is it unconstituional to apply § 704(a) of Title VII in its entirety to respondent? The answer to that question must be "no," and that is the answer here as well.

In sum, imposition of NLRA jurisdiction would not require the school authorities to adopt any government-set code of operations; it would not subject the school's control over its teaching staff to governmental supervision; and it would not empower the NLRB, or the federal courts, to engage in the settlement of theological disputes, or to judge the ultimate worth, or truth or falsity, of the beliefs of the Church. What it would do is to protect lay employees of church-related schools in the same manner that other employees are protected in their employment relationship.[7]

II.

1. The question in this case then, is whether, despite the limited impact of NLRA jurisdiction upon the religious aspects of church school operations, the First Amendment requires that teachers in religiously-affiliated private schools must be denied the right to bargain collectively

[6] §703(e)(2) substantially exempts religious schools from the prohibition against religious discrimination, but Title VII is otherwise applicable to them.

which teachers in other private schools have.[7] The answer to that question is given in *Associated Press* v. *Labor Board*, 301 U.S. 103; the court below misconceived both that case and this Court's religion clause cases in concluding that it was not.'

The issue in *Associated Press*, was whether editorial employees of newspapers must, because of the First Amendment protection of freedom of the press, be excluded from

[7] The issue here is not as the court below supposed whether individuals may practice their religious beliefs, but whether those beliefs justify denying third persons—here, the teachers'—legal right they would otherwise have enjoyed. It is worth noting in this regard that the fact that "[t]he very purpose of [these] schools is to provide an integrated secular and religious education [so that] the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs" (*Meek* v. *Pittenger*, 421 U.S. 349, 366) does not suggest any difference in the character of the employment relationship between teachers and school management in church-affiliated schools as distinguished from other schools, nor do respondents nor the court below rely upon any such difference. Teachers "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ing] in a system dedicated to rearing children in a particular faith" (*Lemon* v. *Kurtzman*, 403 U.S. 602, 618) do differ from other teachers in the curriculum and viewpoint they are expected to teach, but not in the nature of their daily tasks, or in their interest in wages, benefits and working conditions. For, teachers in general are expected to conform to the educational precepts of the school in which they are employed, and to teach subject matter and viewpoints consistent with directions given them by the school's management. And, the fact that a majority of the teachers in these cases have voted for union representation illustrates that, whatever the strength of their commitment to the school's mission, they regard their employment as "secular" at least to the degree that they are, like other employees, dependent upon their employment for their livelihood and desire fair wages, benefits, and conditions.

the protections of the NLRA. The claim of the Associated Press was parallel to that pressed here. The Associated Press, as an organization devoted to publication of bias-free news, has a First Amendment right, it was said, to hire and discharge so as to protect its editorial viewpoint (or actually, in the particular instance, lack thereof) and, moreover, a right protected by the First Amendment to refuse to share any decisions concerning editorial policy with employees through collective bargaining. The Court's answer was that the Act as such, given its limited thrust, does not implicate the right of the employer to publish as it sees fit, or to enforce its editorial policies, and therefore no clash with the First Amendment inhered in mere submission to the Board's jurisdiction under the Act:

> "The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in no wise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published * * * " (*Id.*, at 133).

In particular, the Court pointed out, with regard to the need to retain control of editorial policy through hiring and discharge decisions, that:

> "The statute does not preclude a discharge on the ostensible grounds for the petitioner's action [incompetence as a writer]; it forbids discharge for what has been found to be the real motive of the petitioner [anti-union animus]. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge * * *. The Act does not compel the employer to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor

> or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of [an employee discharged for union activity] in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever its relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible." (*Id.*, at 132).

Finally, the Court, while holding that the Act in general does not interfere with First Amendment rights of a publisher-employer, did not declare that there is no *possibility* that in some future circumstance, a Board order could so interfere with a press employer's publication policies as to raise significant First Amendment questions and to require alteration of otherwise applicable rules. But it refused, on that hypothetical possibility, to absolve press employers of all responsibility under the Act:

> "[Petitioner] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases on the basis of the facts disclosed, never with nonexistent or assumed circumstances." (*Id.*)

The premise of *Associated Press*, then, was not, as the court below supposed, that "[f]ailure of a newspaper employee to carry out a publisher-employer's policy would not bear on freedom of the press." (Pet. App. 38a). The Court, rather, assumed that the First Amendment *would* be infringed if a publisher-employer were forced to retain editorial employees whose writing was inconsistent with the views the employer desired to publish,[8] but held that the Act

would ordinarily have no such effect, and that, if it did prove to have that effect in some particular circumstance, the employer could raise its First Amendment claims at that point.

The fundamental claim here, as in *Associated Press*, is that, because the employer is engaged in activity the

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[8] The attempt to distinguish *Associated Press* led the Court of Appeals into the quite extraordinary statement that First Amendment protection of freedom of the press does not "[include] the right to adopt or pursue a policy without governmental restriction" but is limited to "publication and circulation." (Pet. App. 39a). To the contrary, as the Court recognized implicitly in *Associated Press, supra*, and has since stated explicitly, a newspaper publisher who is made to publish material he does not wish to publish has been impeded in his First Amendment liberties in the most fundamental way:

> "[B]eginning with [*Associated Press* v. *United States*, 326 U.S. 1], the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which "'reason' tells them should not be published is unconstitutional. . . . A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment . . . . [G]overnmental regulation of this crucial process [cannot] be exercised consistent with First Amendment guarantees of a free press. . . ." (*Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256; see also *Associated Press* v. *United States*, 326 U.S. 1, 20, n. 18; *Branzburg* v. *Hayes*, 408 U.S. 665, 681; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 117, (plurality); *id.* at 145 (Stewart, J., concurring); *id.* at 182 n. 12 (Brennan, J., dissenting))

content of which is immune from governmental interference by virtue of the First Amendment, and because that activity is in part carried out through employees, the whole of the employment relationship must be excepted from governmental regulation. The answer of the Court in *Associated Press*—that, by its very nature, the NLRA does not intrinsically interfere with the constitutionally protected activity of the employer, and that wholesale exemption is therefore not required although, in particular circumstances not now present[9] constitutional problems could conceivably arise—must therefore pertain here as well, unless there is something in the nature of the Religion Clauses as applicable to this case which so differs from the press protection accorded by the First Amendment as to require a different result.

[9] The court below did point to several unfair labor practice charges already filed against the schools here involved which, it seemed to believe, render the conflict with First Amendment values real rather than hypothetical. (Pet. App. 33a-34a). Three of these charges, however, involve situations (concerning discharges claimed by the employee to be for union activity, and by the employer) to be for unfitness to carry out the protected activity of the employer precisely parallel to the actual *facts* of *Associated Press* and which this Court held in that case not to be constitutionally beyond the ken of the Board. While the respondents claim that, to determine the true motive "the Board inevitably must assay the moral teachings of the Church there at issue and delve into two thousand years of religious tradition" (Pet. App. 34a), in fact, as pointed out in Part I, *supra*, the Board need not decide whether "the sexual teachings of Masters and Johnson . . . [,] [marrying] a divorced Catholic . . .[,] or [the] structure of a particular course in religion" are consistent or inconsistent with "the moral teachings of the church" (Pet. App. 34a). All that must be determined, as this Court indicated with regard to the parallel claim in *Associated Press*, is whether the school officials believed the conduct in question to be detrimental to the school's

2. While all protections guaranteed by the First Amendment are not, of course, fungible:

> "If [respondent] seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296. All are interwoven there together. Differences

goals, and acted for that reason, or whether, instead, the school officials acted on account of prounion proclivities.

The fourth unfair labor practice charge cited by the Court of Appeals (Pet. App. 34a) demonstrates the reason for the caution in *Associated Press* that the courts refrain from determining general principles on the basis of facts not then before it. For, it is impossible to tell, from the description of the circumstances as to this charge in the opinion below (quoted from a respondent's brief) whether the quotation of scripture by religious authorities mentioned as one basis for an unfair labor practice charge was part of a larger conversation particularly pertaining to promise of economic benefit or loss relating to the teacher's employment, or whether, instead the quotation from scripture stood alone, and the "benefit" or "threat of reprisal" claimed therefore related to standing with God or with the Church. If the latter, we would think significant First Amendment issues would be raised if the Board took cognizance of such a charge by filing an unfair labor practice complaint; on the other hand, we fail to see why the Board would do so, since the employer's arguments against unionism, whether theologically based or otherwise, unrelated to promise of economic benefit or threat of economic reprisal, are not considered to violate the Act.

If, instead, the circumstances were that, in the course of a conversation threatening discharge or other reprisal, for example, school authorities quoted from scripture to illustrate a point, we fail to see why that differs from a lay employer, in the same circumstances, quoting from scripture in which he happens to believe—or, for that matter, quoting from Shakespeare or Karl Marx or the National Review. (Cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617-620.)

there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life." (*Prince* v. *Massachusetts*, 321 U.S. 158, 164-165.)

Thus, if the church-school-employer is constitutionally entitled to an exclusion which a publisher-employer is not, it must be because of some *particular* manner relevant to the regulation here at issue in which the constitutional protection for religion differs from that accorded the press, rather than because freedom of religion as such is accorded a higher place in our scheme of constitutional values than other First Amendment protections.

The opinion below, while less than clear in this regard because it did not recognize *Associated Press* to be a relevant precedent at all, suggests that two related concerns of the Religion Clauses in particular would be accompanied by imposition of NLRA jurisdiction upon church-affiliated schools. The first derives from the line of cases forbidding secular courts and agencies to make decisions upon matters of religious doctrine, and the second involves the proscription upon "excessive entanglement" of the government into church affairs in the course of administering a secular program.

(a.) Because "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine and inactive" as between religion and non-

religion, and as among religious doctrines and beliefs (*Epperson* v. *Arkansas*, 393 U.S. 97, 103) federal courts and agencies must not, of course, involve themselves in the determination of ecclesiastical disputes (see e.g., *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696; *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440; *Maryland and Virginia Church* v. *Sharpsburg Church*, 396 U.S. 367), or in deciding the truth or falsity of beliefs held as a matter of religious faith (*United States* v. *Ballard*, 322 U.S. 78). These principles, however, have no application to this case.

First, there is no constitutional requirement that all disputes which may *affect* church operations, or which involve members of the same church in a controversy related to their religious activities, must not be heard by civil authorities. For example:

> "It is obvious * * * that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awrded * * * First Amendment values are [only] jeopardized when church property litigation *is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.*" (*Presbyterian Church*, *supra*, 393 U.S. at 449 (emphasis supplied); see *Maryland and Virginia Churches*, *supra*.)

As noted in Part I, *supra* (at pp. 11-17), disputes arising under the NLRA should be determinable by "neutral prin-

ciples of law, developed for use in all [labor] disputes," and issues of either abstract truth of religious beliefs, or enunciation of the "true" doctrine of a particular religion, ought never to be at issue. Thus, NLRA jurisdiction over church-affiliated schools does not, as the court below apparently supposed, threaten "the right to maintain theories of life and of death and of the hereafter which are rank heresy to [others]," or entail "put[ting] [the] Church to proof of their religious doctrines or beliefs [by] answer[ing] to [any] man for the verity of * * * religious views." (*Ballard, supra*, 322 U.S., at 86-87).

However, as also there explained determination of NLRA disputes *may* entail investigation into whether the church authorities truly believed in a particular precept and acted upon it in decisionmaking related to employees. This kind of question, however, is not beyond the purview of civil authorities. Whether the sincerity with which a religious belief is held, the character of that belief, and the true motivation for actions claimed to be based upon religious beliefs may be probed in the course of determining an essentially secular dispute—were questions *not* decided in *Ballard, supra*, although the four dissenters in that case did address this kind of question and divided 3-1 in their views. (*Id.*, at 88 (Stone, J., dissenting, joined by Roberts, J., and Frankfurter, J.); *id.*, at 92 (Jackson, J., dissenting.)) In later cases, however, these questions have been faced and decided.

For example, in administering the conscientious objector exception to the selective service system, governmental agencies for many years administered a three-part test: the claimed objector was required to show "that he is conscientiously opposed to war in any form . . . [,] that this opposition is based upon religious training and belief, as

the term has been construed in [this Court's] decision . . . [*a*]*nd he must show that this objection is sincere.*" (*Clay* v. *United States*, 403 U.S. 698, 700 emphasis supplied). In applying and developing this test, the Court recognized that "[t]he validity of what [a registrator] believes cannot be questioned * * * [because] these are inquiries foreclosed to the Government," (*United States* v. *Seeger*, 380 U.S. 163, 184, citing and quoting from *Ballard, supra*, 322 U.S. 78.) The Court, however, "hasten[ed] to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.' This * * * is * * * a question of fact * * *. (380 U.S. at 185.)

Indeed, determining the parameters and sincerity of religious beliefs, as opposed to their abstract truth or doctrinal validity, is necessary precisely in the cases most sensitive to First Amendment values—those in which infringement of religious beliefs or practices by secular, neutral legislation is claimed. For example, in *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 in which an exemption by reason of religious belief from compulsory education laws was sought, the Court said:

> "In evaluating these claims we must be careful to determine whether the Amish religious faith and their mode of life are, *as they claim*, inseparable and interdependent * * * Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has an interest."[10]

[10] See also *id.*, at 240-241 (Stewart, J., concurring):

"Decision in cases such as this and the administration of an

It is worth noting that the inquiry into religious sincerity or motivation which may be required in NLRA cases (see pp. 14-15, *supra*) is not as sensitive as regards Religion Clause values as that undertaken in the conscientious objector situation, and in cases such as *Yoder*. For, under the NLRA, the question of whether a belief upon which an action is based is a "religious" belief, as opposed to a political, economic, moral or any other kind of belief, is ordinarily irrelevant; the question is only whether the "belief" claimed actually motivated the action at issue. For this purpose, it is sometimes helpful to establish that the entity claiming that motivation actually believes as it says it does, but whether it so believes for religious or other reasons ordinarily should not matter.[11]

Thus, to the extent that resolution of NLRA disputes may "involve" religious doctrine, it does not appear that the involvement is generally of the particular types forbidden by the First Amendment. This Court may not exempt church schools from NLRA jurisdiction on the hypothetical possi-

exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create an establishment of religion where it is essential to implement free exercise values threatened by *an otherwise neutral program instituted to foster some permissible, nonreligious state objective.*" (Emphasis supplied).

[11] The "ordinarily" qualification is necessary to allow for the situation left open in *Associated Press, supra*, in which a given neutral rule is claimed to threaten a First Amendment right in a particular situation. Before a need for accomodation to certain beliefs could be established it would be necessary, as it was in *Yoder*, *supra*, to show that the motive was "religious" within the meaning of the First Amendment.

bility that some time in the future, such interdicted inquiry may occur in a particular case. (*Associated Press, supra.*)

In other words, the determination of whether there was an unfair labor practice will never in the first instance necessitate an inquiry into the sincerity or the validity of religious belief or doctrine. It is only where the First Amendment is asserted as a defense, as in *Yoder,* that such an inquiry may have to be undertaken. At that point the religious belief is germane to the question of whether there is in fact a conflict between secular policy and religion and if so whether the Constitution entitles the latter to prevail. But this says no more than that the public policy of the civil authority cannot be required to yield by the mere invocation by an individual or a religious institution of the First Amendment.

(b.) In a series of cases concerning establishment of religion through direct and indirect financial aid to churches and church-affiliated schools, the Court has enunciated a tripartite test for determining whether such aid is constitutionally permitted. "In order to pass muster, the statute must have a secular legislative purpose, must have a principle or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." (See *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736; *Committee for Public Education* v. *Nyquist*, 413 U.S. 756; *Lemon* v. *Kurtzman*, 403 U.S. 602; *Wolman* v. *Walter*, 433 U.S. 229)

The primary impetus for the opinion below seems to have been that since the very schools here involved have propogation of religion as a primary goal and therefore may not consistently with the Establishment Clause, receive on be-

half of their students many forms of state financial assistance,[12] the same test must apply, with the same results, to federal regulation of labor relations which may have the effect of increasing the costs of operating the schools through heightened labor costs.

We take it that there is no dispute that NLRA jurisdiction has a secular legislative purpose. So too we have already illustrated its principal, or primary effect, does not "inhibit religion". And it is not at all clear that the "entanglement" aspect of these cases, upon which the court below so heavily relies, entails a separate inquiry in cases which do not like those in which the test was enunciated and applied plainly involve some effect of inhibiting or advancing religion, even if that effect is not "primary."[13] But it is not necessary to decide this question in this case or to decide whether the Establishment Clause issues are involved here at all or whether, as we would tend to believe, the issues here are purely of the "free exercise" variety. For the test, as enunciated and applied, prohibits only "*excessive* government entanglement" (*Wolman, supra; Roemer, supra*):[14]

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[12] It is worth pointing out that this Court has permitted large amounts of financial aid to flow to these schools directly and indirectly so that the wall of separation in this regard is far from solid. (See, e.g., *Wolman, supra.*)

[13] "The Court has taken the view that a secular purpose in a facial neutrality may not be enough, *if in fact the state is lending direct support to a religious activity*". (*Roemer, supra,* 426 U.S. at 747 (emphasis supplied).)

[14] "There is no exact science in gauging the entanglement of church and state. The wording of the test, which speaks of '*excessive* entanglement', itself makes that clear." (*Id.* at 766, plurality opinion.)

> "Some relationship between government and religious organizations is inevitable *** fire inspections, building and zoning regulations and state requirements of compulsory school attendance laws are examples of permissible contacts *** in order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions that are benefitted, the nature of the [asserted interference with religion] and the resulting relationship between the government and religious authorities." (*Lemon* v. *Kurtzman,* 403 U.S. at 614-615.)[15]

It is plain that because the nature of the government regulation here at issue is of a completely different kind, in both quantity and quality, then in *Lemon* and its progeny that the relationship between church and state which NLRA jurisdiction entails cannot constitute "excessive * * * entanglement."

First, and most important in the aid-to-religious-schools cases, the restrictions upon use of state funds necessitated by avoidance of any direct aid to religious education involved precisely the character of the curriculum which it was the purpose of the school to impart. For example, in *Lemon,* "[a]n eligible recipient must teach only those courses that are offered in public schools and use only those texts and materials that are found in the public schools." (*Id.* at 619.) Moreover, the teacher must refrain, in using

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[15] We do not dispute the holding below that the "character and purposes of the institutions" is the same here as in *Lemon* and the other secondary school aid-to-religious-school cases. Where the Court of Appeals erred was in looking *only* at that aspect of the entanglement test.

books, materials, tests or other services provided through state aid, from expressing religious beliefs or doctrines. Thus, "prophylactic contacts [are] required to insure that teachers play a strictly non-ideological role." (*Meek* v. *Pittenger*, 421 U.S. 349, 370.) The state regulation, then, relates directly to the carrying out of the schools' religious education functions. Here, in contrast, to paraphrase *Associated Press, supra,* 301 U.S. at 133 "[t]he regulation . . . has no relation whatever to [the ideological form of education]. The order of the Board in no wise circumscribes the full freedom and liberty of the [respondents] to [educate] as it desires [to educate]." [16]

Second, in those instances in which entanglement was held to be "excessive", the nature of the regulation required "[a] comprehensive, discriminating and continuing state surveillance * * *" (*Lemon, supra*, 403 U.S. at 619). Here, there is no government "surveillance" at all. The Board, and the courts, became involved only when a claimed breach of a statute occurs. And, that involvement, as discussed previously, concerns no inquisition into religious beliefs or activities forbidden by the Constitution, while the "surveillance" involved in the *Lemon* line of cases involves precisely the prospect of hampering the expression of religious beliefs and the carrying out of religious activities.

Third, the "entanglement" found excessive often in-

[16] Compare that portion of the plurality opinion in *Wolman* v. *Walter, supra,* holding diagnostic services not to involve "excessive entanglement": "[D]iagnostic services unlike teaching or counselling have little or no educational content and are not closely associated with the educational mission of the non-public schools . . . it follows that there is no need for excessive surveillance and there will not be impermissible entanglement." (433 U.S. at 244.)

volves "state inspections and evaluations of the religious content of a religious organization" in order to decide whether a given expenditure is "religious" or not. (*Lemon, supra,* 403 U.S. at 620.) Here, as noted (pp. 11-17, *supra*), it is immaterial whether a particular action by the church is "religious" in origin or intent; to the extent that religious rationales are relevant at all, they are relevant only to negate an anti-union intent, and non-religious rationales can serve that purpose as well.

The best indication perhaps that the "entanglement" here cannot be considered excessive is to compare the relationship between church schools and government here involved with one that the Court has consistently indicated does not involve "excessive" entanglement—(that between these same schools and state agencies responsible for enforcing compulsory school attendance rules.) "The state may require that schools that are utilized to fulfill the state compulsory education requirement meet certain standards of instruction * * * and may examine both teachers and pupils to insure that the state's legitimate interest is being fulfilled * * * (*Wolman, supra,* 433 U.S. at 240, plurality opinion citing several majority opinions). Compulsory education regulation, then, does involve continuing involvement with the teachers and students of the scool, and also involves setting standards for a secular aspect of the school's operations. Because the state is able, however, to attain its secular ends wihout any realistic prospects of unconstitutional involvement in the religious aspects of the school's operations, the mere fact that the government is involved in continuing relationship albeit an essentially secular one, cannot constitute "excessive entanglement."

Finally, it is worth pointing out that "excessive entangle-

ment'' with the press is no more constitutionally acceptable than such entanglement with religion, where the ''entanglement'' involves government interference with the publisher's ability to publish as it sees fit. (See *Tornillo, supra.*) The government may no more enforce a political orthodoxy upon private persons than it may impose a religious one. The thrust of *Associated Press, supra*, is that the relationships between government and employer under the NLRA augered no such imposition and that publisher-employers were therefore not, without more, exempt from the Act's provisions. The character of the relationship between church school-employers and government under the NLRA is precisely the same as that between newspaper publisher-employers and government. Thus the perception of *Associated Press* that this relationship does not involve the danger of government control over and interference in protected activity of the employer must prevail here as well.

CONCLUSION

For the above stated reasons the decision below should be reversed.

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